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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

No. 480

PANGBORN CORPORATION,

Petitioner,

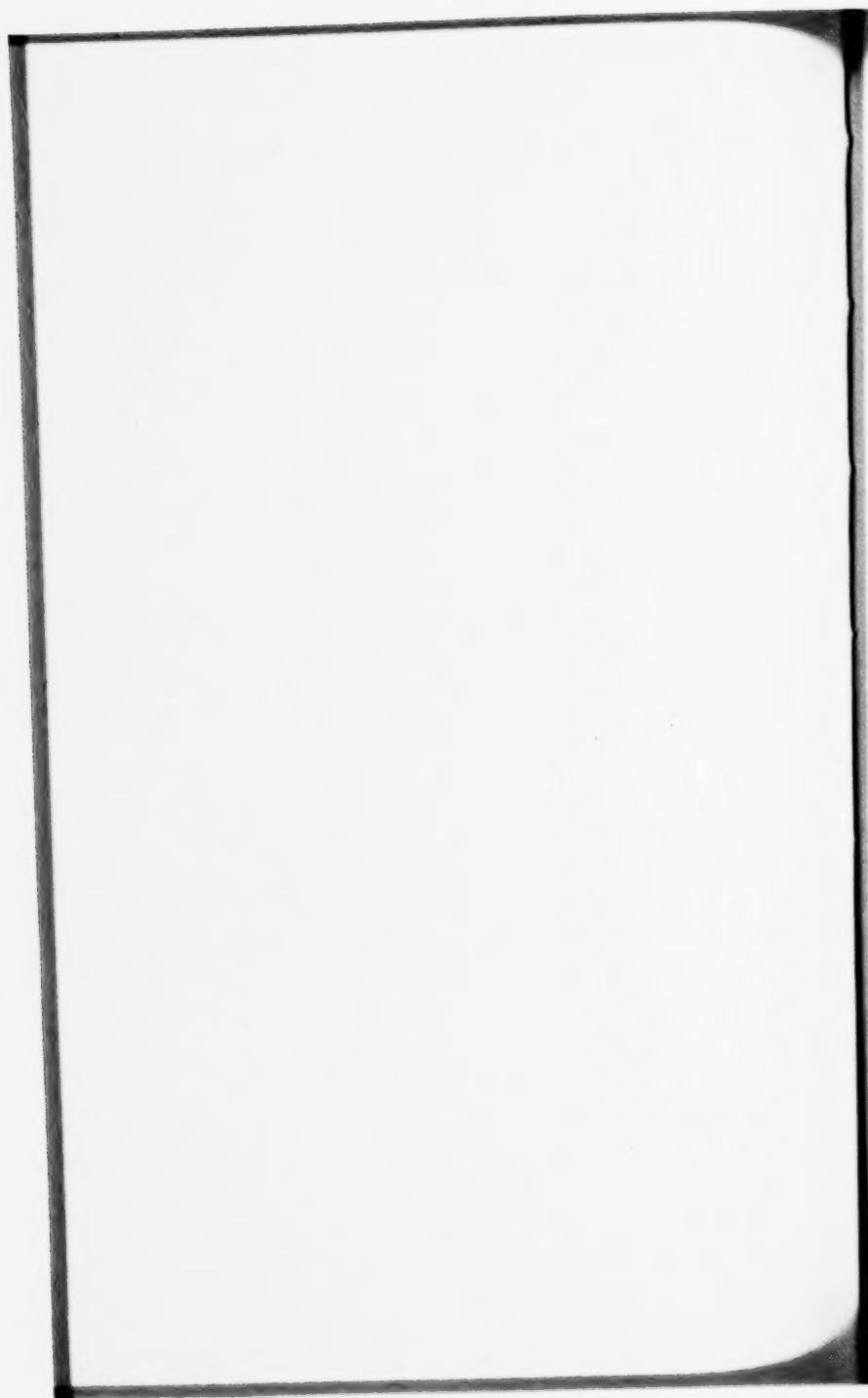
vs.

THE AMERICAN FOUNDRY EQUIPMENT
COMPANY,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

✓
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Attorneys for Petitioner.



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No.

PANGBORN CORPORATION,

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THE AMERICAN FOUNDRY EQUIPMENT
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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review a decision of that Court entered September 28, 1948 (170 Fed. 2d 339), affirming a decree of the United States District Court for the District of Delaware.

A certified transcript of the record, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

Jurisdictional Statement

Jurisdiction is invoked under Title 28, United States Code, Section 1254.

Summary Statement of the Matter Involved

Your petitioner, a corporation of Maryland, having its factory and principal place of business at Hagerstown in said state (hereinafter called "Pangborn"), seeks to have reviewed and reversed a judgment by the Court of Appeals for the Third Circuit made on September 28, 1948 (R. 393-400), holding, in effect, that Pangborn's pleadings in said action filed in the District Court for the District of Delaware fail to state a claim upon which Pangborn would be entitled to relief under any state of facts which might be proved in support thereof.

Said action sought to obtain from a "suitor", in an earlier patent suit, appropriate relief from irreparable and continuing injury sustained by petitioner, by reason of fraud perpetrated in the Patent Office by respondent in an effort to obtain a species patent directed to a tool of industry petitioner was marketing, and fraud and deceit perpetrated by respondent in the Courts in said patent suit, whereby respondent obtained a decree and affirming judgment finding claims of the patent declared on valid, for a pioneer invention and infringed by said tool; respondent's proofs and representations in said patent suit being false and antithetical to its proofs and representations earlier submitted in the Patent Office and involving Interference No. 72,090, which respondent provoked as the result of the corruption of another application it there had pending; said interference proceedings and a subsequent Protest filed by respondent serving to so delay the grant of a third-party patent that it was not available for establishing prior invention in said patent suit.

The respondent, a corporation of Delaware (hereinafter called "American"), has its factory and principal place of business in Mishawaka, Indiana.

The parties are competitors in the manufacture and marketing of directional control, centrifugal, blasting machines (in construction and operation practically replicas), used primarily for the surface cleaning of castings and analogous articles, by mechanically propelling thereagainst, at high velocity, broken steel shot, known as "grit."

In the fall of 1934 American commenced to market its machine under the name "Wheelabrator." In construction and operation the machine is substantially that of its Hammell application S. N. 725,055, filed May 11, 1934, the salient features of which are illustrated on p. 36x of the Exhibit Book to the Appendix to Pangborn's Brief in the Court of Appeals (hereinafter identified by the letters "E. B.").

American never marketed a machine substantially the same, structurally or functionally, as that disclosed in the Peik application S. N. 685,025 (*Post* 28; E. B. 1x), or that disclosed in the Peik patent No. 1,953,566 (*Post* 28; E. B. 16x-20x). The latter, although the acme of Peik's achievement, was of no practical worth and was scrapped; the former died a-borning.

Pangborn first exhibited its directional control, centrifugal, blasting machine (E. B. 26x-34x; bottom 35x) to the foundry industry in October, 1934. It was a joint invention of its employees Rosenberger and Keefer. As early as January, 1935, it was selling these machines in substantial quantities, under the name "RA Rotoblast" (*Post* 29). It was a success from the outset, and Pangborn continued the marketing thereof, in increasing quantities, until the judgment of the Court of Appeals for the Third Circuit on March 23, 1939 (102 Fed. 2d 964), affirming the decision of the District Court for the Western District of Pennsyl-

vania in *American Foundry Equipment Company v. Pittsburgh Forgings Company and Pangborn Corporation* (67 F. Supp. 911). This case will be hereinafter referred to as "The Pittsburgh Suit."

The Court of Appeals in "The Pittsburgh Suit" found the Peik patent No. 1,953,566 to be valid, and infringed by the "RA Rotoblast" upon the hypothesis that the patent disclosed for the first time a directional control, centrifugal, blasting machine, and that:

"The accused structure infringes claim 16, which is typical of the claims in suit, for it embodies the fundamental concept of the Peik patent, namely, directional control."¹

No finding was made by the Appellate Court that the accused structure exhibits substantially the same number of elements, or substantially the same structure or function thereof, as any Peik claim. Claim 16 was accorded a scope sufficiently sweeping to cover any sort of centrifugal blasting machine which had been, or might be, devised, provided it exhibited the function of "directional control," or in which directional control of the abrasive stream could be effected.

The decree of the District Court in "The Pittsburgh Suit," and its affirmance by the Court of Appeals, were induced by corruption and fraud perpetrated by American in the Patent Office, and fraud and deceit perpetrated by it in the Courts.

Prior to the ascertainment by Pangborn Corporation of the corruption, fraud and deceit, it filed in this Court a petition for a writ of certiorari to the Court of Appeals, praying for its allowance and that the judgment of the Court of Appeals of March 23, 1939 be reviewed and re-

¹ Indubitably refuted by the Grocholl patent No. 2,224,647 (antedating the earliest date ever asserted for Peik).

versed. The petition was denied October 9, 1939 (308 U. S. 566).

Promptly after the proceedings in Interference 72,090 and the subsequent Protest became available to the public, (on the grant of the Grocholl patent), Pangborn filed in the Court of Appeals, based upon this newly discovered evidence, a petition for leave to file in the District Court a petition for leave to file a bill in the nature of a bill of review and for a rehearing. After full oral arguments and the consideration of printed briefs, the Court granted the petition. The petition was thereupon filed in the District Court. It was treated there as a petition for rehearing and denied, because of the rule of *United States v. Throckmorton*, 98 U. S. 1, which at that time in the Third Circuit was "more honoured in the breach than the observance" (*Publicker v. Shallcross*, 106 Fed. 2d 949) and was abolished by Rule 60(b)3, R. C. P., and upon other equally untenable grounds.

July 1, 1940 in interference 71,085 Pangborn's employees Rosenberger and Keefer were adjudged prior inventors to Peik (113 Fed. 2d 129).

Interference 71,085 was declared July 9, 1935 between American's Hammell application S. N. 725,055 aforesaid, and Pangborn's Rosenberger and Keefer application S. N. 726,188.

Over Pangborn's objection, American in this interference substituted for its Hammell application a tainted revived Peik application S. N. 685,025, which application had been permitted to abandon upon the filing, to take its place, on Jan. 24, 1934, of application for the Peik patent No. 1,953,566, granted April 3, 1934.

On May 21, 1935, former Asst. Commissioner of Patents Frazer revived application S. N. 685,025 upon a petition filed March 9, 1935, by American, supported by a false and

fraudulent showing. (July 19, 1948 the present Commissioner of Patents, because of this false and fraudulent showing, vacated the order which had been made reviving the application, dissolved it out of Interferences 74,841 and 75,177, in which it was then involved with applications owned by Pangborn, and held it to be abandoned. (R. 398.)

Pangborn had opposed the substitution for the Hammell application of the Peik tainted application in Interference 71,085. Pangborn had petitioned that an investigation be made to determine whether the application had been revived without authority in law and upon a false and fraudulent showing.

The petition was denied upon the hypothesis stated by the then Asst. Commissioner of Patents, Mr. Justin W. Macklin, that while the Commissioner has authority to revive an abandoned application, once having exercised this right he has no power to kill it, so long as it remains in interference; irrespective of the conclusiveness of such showing as might be made that the petition to revive was false and fraudulent.

Upon the denial of Pangborn's petition, Interference 71,085 (then entitled *Rosenberger and Keefer v. Peik*) was proceeded with, and in due course on July 1, 1940 a final decision was made by the United States Court of Customs and Patent Appeals (113 Fed. 2d 129), affirming the decision of the Board of Appeals in the Patent Office awarding priority of invention to Rosenberger and Keefer.

In respect to American and Pangborn this decision is *res judicata* in the Patent Office, as to all patentable subject matter common to either the Hammell application, or the Peik application, and Pangborn's Rosenberger and Keefer application (Patent Office Rule 109).

After this final decision in Interference 71,085 Rosenberger and Keefer, on behalf of Pangborn, filed application S. N. 382,256, which is a continuation in part of application

S. N. 726,188, which had been involved in said interference, and upon the former application on June 27, 1944 patent No. 2,352,588 was issued to Pangborn Corporation (E. B. 26x-34x).

Claims 7 to 10 of this patent clearly define the "RA Rotoblast" type of directional control, centrifugal, blasting machine for which priority was awarded to Pangborn as stated, in Interference 71,085.

American having learned prior to February 1933 of the use in Germany of a directional control, centrifugal, blasting machine, substantially as disclosed in the Grocholl German patent No. 539,056,² which issued on an application filed May 10, 1930, planned to monopolize, patentwise, the manufacture, use and sale of directional control, centrifugal, blasting machines in the United States.

In carrying out this scheme, American acquired United States application for patent of Hollingsworth S. N. 570,782, filed Oct. 24, 1931, disclosing a centrifugal, blasting machine, unprovided with means for effecting directional control. American corrupted this application by an amendment filed February 3, 1933, interpolating into its specification a description of one means for effecting directional control. Subsequently, for the same purpose, it changed the drawing of the application (E. B. 21x-22x).

Repeatedly it asserted in the prosecution of the Hollingsworth application that he was the first inventor of a directional control, centrifugal, blasting machine³; antithetical to its own proofs and arguments presented in the Pittsburgh Suit.

Peik brought to the attention of The Wean Engineering Company the idea of a directional control blasting machine

² Drawings corresponding to the later granted Grocholl United States patent No. 2,224,647 (E. B. 2x-10x).

³ And adduced proofs to that effect in Interference 72,090, post 9.

disclosed in the Peik application S. N. 685,025 (described post 28; E. B. 1x).

He, with his associates Bird and Schultz, entered into a joint venture with The Wean Engineering Company which contemplated the design, manufacture and marketing of a practical directional control blasting machine. In October, 1933, an order was obtained for two of such machines conditioned upon the successful operation thereof. Duplicate machines were completed as early as January, 1934, and an application for patent disclosing this machine was filed by Peik (and assigned to The Wean Engineering Company) on January 23, 1934, to take the place of the Peik application S. N. 685,025, which had been rejected by the Patent Office on October 14, 1933.

The substituted application issued as patent No. 1,953,566 to The Wean Engineering Company on April 3, 1934 (E. B. 16x-20x).

At least one of these machines was tested by the purchaser in the blasting room of its factory, under the supervision of its experts, and Peik and Wean, in March 1934. Because of fundamental infirmities, it failed and was scrapped. This marked finis to Peik's work and to the Peik machine.

About January 1935 American induced The Wean Engineering Company to sell its associates "down the river" and transfer to it the Peik inventions. Wean's *quid pro quo* was the right to sell to the steel industry American's "Wheelabrators".

On February 4, 1936 American commenced The Pittsburgh Suit.

On the same date it provoked Interference 72,090 between its corrupted Hollingsworth application S. N. 570,782, filed October 24, 1931, and the United States application of Grocholl S. N. 534,249, filed under the International Convention,

based on the application filed May 10, 1930 by Weber and Grocholl for German patent No. 539,056.

In Interference 72,090 American adduced proofs on the eve of the trial of *The Pittsburgh Suit*, which, according to its own representations to the Patent Office, established that as early as 1929 (more than 3 years prior to the earliest date ever asserted for Peik) Hollingsworth had in successful use in this country one, or more, directional control, centrifugal, blasting machines constituting "prior uses" to the Grocholl application. Priority of invention, in Interference 72,090, was in consequence awarded to Hollingsworth.

Thereafter, based upon these proofs and this award, American filed in the Patent Office a "Protest" to the issuance of any patent on the Grocholl application.

The effect of these proceedings—(a) corruption of the Hollingsworth application; (b) declaration of interference 72,090; (c) proceedings therein; and (d) American's protest—was to so delay the issuance of a patent on the Grocholl application that no patent granted thereon was ever available in *The Pittsburgh Suit* for establishing prior invention.⁴ Had such patent been available, it would have shown, as the present Grocholl patent, granted on the same application, now does, that Peik was not the first inventor of a directional control, centrifugal, blasting machine.

This fact, according to American's own contention in Interference 72,090, was established by the proofs in that interference of the Hollingsworth "prior uses".

American in *The Pittsburgh Suit* concealed from the Courts the knowledge it had of the United States Grocholl application and the date to which it was entitled under the

⁴ Patent No. 2,224,647 (E.B. 2x-10x) which was issued December 10, 1940 to Grocholl, both discloses and claims (claim 4) one type of directional control, centrifugal, blasting machine, having an effective date antedating the earliest date ever asserted for Peik.

International Convention, and its virtual suppression, or at least critical delay in the issuance, of a patent on this application. It also concealed the knowledge it had of the 1929 Hollingsworth "prior uses" and the many representations it had made to the Patent Office that Hollingsworth was the first inventor of the directional control, centrifugal, blasting machine.

American's proofs and arguments in The Pittsburgh Suit regarding Peik's pioneership are antithetical to the proofs and representations American made in the Patent Office, particularly in Interference 72,090. These proofs and representations estop American from denying that Peik trailed both Hollingsworth and Grocholl.

Thus by fraud and deceit American succeeded in having accorded to its Peik patent, for a machine of no practical worth, a sweeping scope; limited only by the function, or effect, of directional control.

Indeed it is apparent from the opinion of the Court of Appeals in The Pittsburgh Case that it made no comparison between claim 16 of the Peik patent (that selected as typical) and the "RA Rotoblast," for ascertaining whether the latter exhibited the same number of elements as the claim requires, or elements substantially identical in structure and function.

For further fortifying its patent position, after it learned that the "RA Rotoblast" was being sold in substantial quantities, American, in carrying out its original scheme or plan of monopolizing this important tool of industry, sought to obtain a species patent which would dominate the multi-vane impeller having an axial unimpeded passageway which had proven to be a *sine qua non* of the "RA Rotoblast". It did this by filing a petition to revive the Peik application S. N. 685,025, which had been intentionally abandoned, and supporting the petition with a false and fraudulent show-

ing. It almost succeeded in this undertaking. It might have, save for the view publicly expressed by former Commissioner of Patents Casper W. Ooms (the predecessor of the present incumbent of that high office) in an address to the American Bar Association at its annual convention in Atlantic City on October 26, 1946, and his decision in *Ex parte Mallard*, 71 USPQ 294; and the decision on July 19, 1948 of the present Commissioner of Patents (R. 398).

Had American succeeded in connection with the Peik application 685,025 it would have had a Peik patent with a sweeping scope and in addition might well have obtained a species patent to dominate the RA Rotoblast and with a life extending far beyond the date of expiration of the Peik patent 1,953,566.

The rulings adverse to Pangborn by the Court of Appeals in its judgment of September 28, 1948 are in effect that Pangborn's pleadings do not state a claim which, if established by proof, would entitle it to relief; that the denial of its motion of May 15, 1944 (R. 196a-203a) by the District Court's decree of May 15, 1947 (R. 364a) should be affirmed; and that on remand of the cause an order should be made striking out Pangborn's answer ⁵ filed January 6, 1948 (R. 370a-391a).

⁵ This is not an answer to a pleading "which the Court below did not allow American to file." This answer was filed, by leave of Court. It is a response to an amendment and supplement to defendant's counterclaim lodged in the office of the District Court on August 13, 1946, the case then being in the Court of Appeals. The opinion of September 28, 1948 of the Court of Appeals says:

"We will treat the amendment and supplement to the counterclaim, as did the court below, as having been properly filed on the day stated."

American also by *motion* of January 3, 1947 submitted a proposed amendment for averring a declaratory judgment claim re Pangborn's patent No. 2,352,588. The *motion* was denied by the District Court (R. 363a). The Court of Appeals affirmed. (R. 399-400.)

We submit that Pangborn's pleadings *sub judice* are:

(A) Amended complaint (R. 151a-195a).

(B) Answer to defendant's counterclaim (R. 142a-150a; see particularly R. 142a, 143a; paragraph (f) R. 144a; and section 7, R. 150a).

(C) Answer to amendment and supplement to defendant's counterclaim (R. 370a-391a).

Pangborn by a motion filed May 15, 1944 sought to amend its amended complaint. *Inter alia*, it averred the filing about September 1, 1934 by Hollingsworth, at the behest of American, of a second application for patent practically the same as the first application as filed, plus the disclosure of means for effecting directional control; that therein Hollingsworth averred that he was the original, first and sole inventor of the subject matter of the second application; that he (Hollingsworth) did not know and did not believe that such subject matter was ever known or used before his invention, or patented or described in any printed publication more than two years prior to the date of filing of his first application, or in public use in the United States more than two years prior to said date. The proposed amendment to the amended complaint also averred that American had aided and abetted Hollingsworth in the preparation and filing of the oath of this application.

It further averred that Pangborn had no knowledge of this second Hollingsworth application prior to September 1, 1943, when it was disclosed in an exhibit forming a part of an affidavit of Austin, executed on that date, and filed in the case at bar.

The disclosure in the amendment of February 3, 1933 in the first Hollingsworth application (constituting "conception"), coupled with the second Hollingsworth application (constituting "reduction to practice") establish completion

of the act of invention of a directional control, centrifugal, blasting machine antedating the invention ascribed in The Pittsburgh Suit to the Peik patent.

Although repeatedly called to his attention, the District Court of Delaware did not dispose of the motion of May 15, 1944 until May 27, 1947, when he denied it *nunc pro tunc* as of May 15, 1947 (R. 364a).

The opinion and judgment of the Court of Appeals here sought to be reviewed and reversed contains no statement indicating a realization that petitioner was asserting a claim bottomed on corruption by American, in the Patent Office, of the Hollingsworth application, and the delaying of the issuance of a patent on the United States Grocholl application S.N. 534,249 (virtually making away with evidence) by involving the latter application in Interference 72,090 with said corrupted Hollingsworth application; adducing proofs in said interference of "prior uses" of directional control blasting machines in the United States as early as 1929 by Hollingsworth, and antithetical proofs and representations made by American in the Courts in "The Pittsburgh Suit," constituting the perpetration of fraud and deceit in said Courts; resulting in the tainted decree of the District Court and the tainted judgment of the Court of Appeals.

Questions Involved

(1) Have the pleadings *sub judice*, averring a claim bottomed on fraud perpetrated in the Patent Office by American in obtaining the revival of an abandoned patent application, and a claim bottomed on fraud perpetrated in an ordinary patent suit by American in obtaining a decree finding the patent declared on valid and infringed, and an affirming judgment, become obsolete because the decision of the Commissioner of Patents (R. 398) has practically made moot the first claim?

(2) In an ordinary patent suit brought by American against Pangborn a decree having been made and affirmed by the Court of Appeals holding the patent declared on valid and infringed on American's proofs and argument that a claim selected as typical of those in suit is for a pioneer invention; whether there should be dismissed, on the ground that its pleadings fail to state a cause of action, a second suit brought by Pangborn against American, in a different federal court having judisdiction of the latter, said second suit averring a claim based on grounds, *inter alia*, that American's proofs and arguments aforesaid in the first suit were false and fraudulent and antithetical to proofs and representations made by American in the Patent Office for preventing, and which did critically delay, the issuance of a third-party patent which would otherwise have *per se* established invalidity, or non-pioneership, of the patent declared on; said Patent Office proceedings including proofs and arguments that another assignor of American had the asserted pioneer invention in public use in this country long prior to the earliest date of invention asserted for the patent declared on in the first suit; said second suit praying for relief from an injunction issued in the first suit, for restitution of royalties paid by reason thereof, and the decree and judgment thereon, and for damages otherwise arising from the decree and judgment.

(3) Do the pleadings in the second suit aforesaid fail to state a claim; they averring, *inter alia*, that American corrupted its application for patent, induced the Patent Office to declare an interference between it and a third-party application, the latter having an effective date of invention prior to that of the patent declared upon in the first suit, and in the interference adduced proofs and made representations for establishing a date of invention for the corrupted application antedating that of the third-party application, thereby obtaining a priority award in the interfer-

ence, and thereafter filing a Protest to the issuance of any patent on the third-party application, resulting in such delay in the issuance of a patent thereon that it was not available as a prior invention item in the patent suit; and said pleadings praying for relief from the injunctive order issued pursuant to the decree and for restitution and for exemplary damages.

(4) Has the Court in the second suit, in the exercise of its equitable power, authority to afford Pangborn relief from the tainted decree in the first suit by an order enjoining the enforcement of the injunctive order made therein, and to accord Pangborn restitution of all royalties or other payments made pursuant to the decree in the first suit, and damages?

(5) Assuming the Commissioner of Patents has gone to the full extent of his authority and power in according Pangborn relief from the fraud and deceit practiced by American in connection with the revival of the Peik application S. N. 685,025,—does that prevent the District Court for the Dis-

(6) Whether the denial of Pangborn's motion of May 15, 1944 was untenable, contrary to custom, and to the express provision of Rule 15(a), R.C.P.

Reasons Relied On for the Allowance of the Writ

Exercise of the power of this Court to grant the writ of certiorari prayed is sought on grounds as follows:

(1) Because the holding by the Court of Appeals that Pangborn's pleadings prior to the attempted amendment (motion filed May 15, 1944, R. 196a) state no controversy cognizable in the District Court of Delaware, is untenable and in conflict with the applicable decisions of this Court.

(2) Because the holding of the Court of Appeals that petitioner's pleadings and attempted pleadings are now ob-

solete because of the decision of the Commissioner of Patents of July 19, 1948, finding that respondent had perpetrated fraud in obtaining the order reviving the Peik application S. N. 685,025, vacating the order, dissolving the revived application out of interferences in which it was then involved, and holding it to be abandoned, is untenable, and states an important question of federal law which has not been but which should be decided by this Court.

(3) Because the statement of the Court of Appeals is untenable that petitioner still seeks to have the District Court of Delaware perform the functions of the Patent Office.

(4) Because the statement of the Court of Appeals is untenable in its opinion of September 28, 1948 that petitioner seeks to have set aside the decree of the District Court in "The Pittsburgh Suit." Petitioner's action is against a former suitor in that Court and not against the Court.

(5) Because the Court of Appeals' affirmance of the denial of petitioner's motion of May 15, 1944 for leave to amend its amended complaint is untenable, contrary to established custom and practice and in contravention of the express provisions of Rule 15(a), R. C. P.

(6) Because of the remand of the cause to the end that the District Court may make an order striking out Pangborn's answer filed January 6, 1948 (R. 370a), which it was permitted to file (if that is the answer referred to in the concluding paragraph of the decision of the Court of Appeals) (R. 400).

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THE AMERICAN FOUNDRY EQUIPMENT
COMPANY,

Respondent

BRIEF IN SUPPORT OF PETITION

As pointed out, after American learned of the species of directional control, centrifugal, blasting machine disclosed in the Weber and Grocholl German patent No. 539,056, it did the following:

(1) Planned to monopolize the manufacture, use and sale of such machines in the United States by patents.

(2) Acquired the Hollingsworth application S. N. 570,782, filed October 24, 1931. .

(3) Corrupted this application by interpolating therein a description and illustration of means for effecting directional control of the abrasive stream.

(4) Provoked Interference 72,090 between the corrupted application and the United States application for patent of Grocholl, S. N. 534,249, filed May 1, 1931, having an International Convention date of May 10, 1930, and disclosing the same species of directional control blasting machine as that disclosed in the Weber and Grocholl German patent.

(5) Repeatedly contended in the prosecution of the Hollingsworth application that Hollingsworth was not only the first inventor of a directional control blasting machine, but in fact the inventor of such machines as the species then on the market, namely, American's "Wheelabrator" and Pangborn's "RA Rotoblast."

(6) Adduced proofs in Interference 72,090 and in the Patent Office asserted that they established that as early as 1929 Hollingsworth had, in this country, one or more directional control blasting machines in successful use, constituting "prior uses" to Grocholl's Convention date (May 10, 1930),¹ *a fortiori* earlier than Peik's inventions, which proofs induced the Patent Office to award to Hollingsworth priority of invention in Interference 72,090.

(7) Thereby, and by a subsequent "Protest" based on the proofs and the priority award, delayed the grant of a patent on the Grocholl application beyond the date of the judgment of the Court of Appeals in "The Pittsburgh Suit".

(8) Concealed from the Courts in "The Pittsburgh Suit" all knowledge of Interference 72,090 and the facts aforesaid occurring therein, and stemming therefrom.

The proofs and representations made by American in the Patent Office are antithetical to those which it made

¹ Complete refutation, if true, of findings by the courts in "The Pittsburgh Suit" that Peik was the first inventor.

in "The Pittsburgh Suit". In "The Pittsburgh Suit" the Courts found that the Peik patent No. 1,953,566 is valid, and that the accused structure (the "RA Rotoblast") infringed claim 16 thereof (the claim selected as typical of those in suit) "for it embodies the fundamental concept of the Peik patent, namely, directional control."

Civil Action 193, brought by Pangborn in the District Court of Delaware, wherein American is incorporated, averred, *inter alia*, in its jurisdictional paragraph that the matter in controversy exceeded the sum of \$3,000.00, excluding costs.

The pleadings aver as one claim upon which, if established by proofs, the Court should grant relief, that the decree and judgment in "The Pittsburgh Suit" were obtained by knowingly false proofs and representations made by American, antithetical to those made in the Patent Office leading to the declaration of, and the judgment of priority in, Interference 72,090, *Hollingsworth v. Grocholl*; that by said proofs and representations and judgment in this interference, and the subsequent Protest filed by American to the grant of any patent on the Grocholl United States application, the grant of the Grocholl patent No. 2,224,647 was delayed beyond the date of the judgment aforesaid of the Court of Appeals in "The Pittsburgh Suit", so that a United States Grocholl patent was not available, as it might well otherwise have been, for establishing a date of invention by another prior to the earliest date of invention asserted for Peik. The prayer for relief bottomed on the claim aforesaid was for an order enjoining American from the further use of the decree, or judgment, obtained in "The Pittsburgh Suit", against Pangborn, or anyone in privity with it; for the restitution by American of all

amounts it had received from Pangborn stemming from such decree, or judgment; and for the damages incurred by Pangborn arising out of such decree, or judgment and for an appropriate increase thereof.

Pangborn's pleadings in Civil Action 193 further averred a claim for an injunctive order² and for damages substantially as aforesaid arising out of American's fraud and deceit perpetrated in the Patent Office, whereby it induced the latter tribunal to revive the Peik application S. N. 685,025, which American had intentionally abandoned after it had filed, to take its place, the application which matured in the Peik patent No. 1,953,566, and induced the Patent Office in Interference 71,085 to permit it to substitute for its Hammell application the tainted Peik application.

In view of the foregoing, Pangborn was compelled, at large expense, to contest the re-formed interference, and was in consequence delayed in obtaining a patent on its Rosenberger and Keefer invention for a period of practically five years, during which American was able to use such invention and did use such invention (incorporated in its Wheelabrator) without liability for patent infringement, and Pangborn was also compelled to contest (until the decision of the Commissioner of Patents of July 19, 1948) Interferences 74,841 and 75,177.

Although as early as November 30, 1936 the attention of the Patent Office was called to the tainted revival of the Peik abandoned application, and objection made to its substitution by American in Interference 71,085 for its Hammell application, the Patent Office then and repeatedly thereafter held that having revived the application it was

² Now moot, because of the decision of July 19, 1948 of the Commissioner of Patents, holding that the Peik application S. N. 685,025 had been revived by fraud and deceit, dissolving it out of Interferences 74,841 and 75,177, and holding it abandoned.

impotent to kill it so long as it was in an interference, however conclusively Pangborn's petition might establish that the application had been revived by fraud and deceit; and a change in the policy of the Patent Office did not occur until the administration of Commissioner of Patents Mr. Casper W. Ooms.³

The action of the Patent Office regarding Pangborn's charge of fraud and deceit and requiring that the contests in Interferences 71,085, 74,841 and 75,177 be continued, we submit, was contrary to the views of this Court as expressed in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238; *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U. S. 806; and *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575; by the Patent Office in *Ex Parte Mallard*, 71 USPQ 294; by the Court of Appeals for the Fourth Circuit in *Mas v. Coca-Cola Co.*, 163 Fed. 2d 505; and by the specially designated Court of Appeals for the Third Circuit in *Root Refining Co. v. Universal Oil Products Co.*, 78 USPQ 95.

We submit that the District Court of Delaware, and the Court of Appeals for the Third Circuit on appeal from the decree of the District Court of Delaware, had the power to afford Pangborn relief upon the claims recited in its pleadings in Civil Action 193. (*Marshall v. Holmes*, 141 U. S. 589; *Steelman v. All Continent Corp.*, 301 U. S. 278, 291; *Oliver v. City of Shattuck*, 157 Fed. 2d 150.)

The circumstance that the District Court for the Western District of Pennsylvania denied the petition for rehearing in "The Pittsburgh Suit" (41 F. S. 841), from which there was no appeal, should not deter relief being granted Pangborn in Civil Action 193 brought against a "suitor" which

³ Announced in the address of Mr. Commissioner Ooms at the October 26, 1946 meeting of the American Bar Association. Cf. *Ex Parte Mallard*, 71 USPQ 294.

had perpetrated corruption, fraud and deceit on the Patent Office and in the Courts.

True, following the denial of the petition for rehearing by the District Court for the Western District of Pennsylvania aforesaid, Pangborn by economic duress, was impelled to "crook the pregnant hinges of the knee" and make a settlement with American.

But public policy forbids that such a settlement should be taken as an acquiescence in American's fraudulent conduct. The situation is little different from that covered by the statement of the Chief Judge of the Court of Appeals for the Third Circuit in the *Hazel-Atlas* case (137 Fed. 2d 764).

In any event, any dereliction on the part of Pangborn in the continuation of its efforts to obtain adequate recognition of the corruption, fraud and deceit perpetrated by American in the Patent Office and in the Courts in carrying into effect its scheme to monopolize the manufacture, use and sale of directional control, centrifugal, blasting machine, should not deter this Court from affording the public relief and vindicating the integrity of the Patent Office and judicial tribunals. As stated by the specially designated Court of Appeals for the Third Circuit in *Root Refining Co. v. Universal Oil Products Co.*, 78 USPQ 95, 1. c. 101:

"The matter is not one of merely private concern subject to the action or inaction of the litigants, but is one of vast public importance, so that it becomes immaterial that the injured party may have been derelict in bringing the fault to the Court's attention."

Quoting from *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, the Court said:

"It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that

preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.' "

It further said :

"The power inheres in the appellate as well as in the trial court and the former may vacate its own judgment and direct the vacation of a decree of the latter entered pursuant to the mandate of the former. In discussing this question and rejecting the argument that although the Courts of Appeals have power to permit the trial courts to review a judgment attacked for fraud in a case which the appellate court has reviewed, the appellate court may not review the judgment itself after the expiration of the term, the Supreme Court said * * * :

" 'Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. * * * We hold, therefore, that the Circuit Court on the record here presented had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions.' "

In the case *sub judice*, it would appear that the Court of Appeals completely ignored the averment in the pleadings that by fraud and deceit perpetrated in the District

Court and in the Court of Appeals itself, the latter in "The Pittsburgh Suit" was induced to reach a conclusion that the Peik patent is valid, and pioneer in scope, antithetical to American's representations and proofs in the Patent Office leading to the declaration of, and judgment in, Interference 72,090.

In the Court of Appeals' opinion of September 28, 1948 (R. 392), no reference whatsoever is made to this fraud and deceit. The Court apparently focused its attention entirely upon the fraud and deceit perpetrated in the revival of the Peik application S. N. 685,025, of which it had made light in its opinion of August 12, 1946 (R. 312a). This, as Pangborn called to the attention of the Court of Appeals prior to said opinion, had become moot, at least as to the injunctive order sought, by reason of the decision of the Commissioner of Patents of July 19, 1948.

The present Commissioner of Patents investigated the fraud charge and sustained it and thereupon vacated the order reviving the Peik application S. N. 685,025, dissolved it out of the interferences in which it was then involved, and held that it is abandoned. Pangborn promptly informed the Court of Appeals thereof and suggested that it made moot this question of fraud.

In its opinion of the date last given (R. 392) there is no indication that the Court of Appeals recognized that Pangborn was asserting that the decision of the Courts in "The Pittsburgh Suit," and particularly the scope which said Court of Appeals itself gave to the Peik patent No. 1,953,566 (*supra*, p. 4), was due to fraud and deceit, including proofs and representations made in both Courts antithetical to its proofs and representations made in the Patent Office regarding the Hollingsworth invention and the "prior uses" thereof in 1929, and American's procedure in the Patent Office whereby it so delayed the issuance of a patent on the Grocholl application that such a patent was not avail-

able in "The Pittsburgh Suit" for establishing that Peik was not a pioneer inventor.

We submit that American is estopped to deny the verity of its own representations and proofs made in the Patent Office. In Interference 72,090, American adduced proofs on the eve of the trial of "The Pittsburgh Suit" and represented that they established that as early as 1929 Hollingsworth had in successful public use in this country one or more directional control, centrifugal, blasting machines, constituting "prior uses" to the Grocholl application, which in said interference was conclusively entitled to a date of invention as early as May 10, 1930. The issue of that interference recited one species of directional control, centrifugal, blasting machine. That being true, on what possible theory could Peik, who did not enter the field until March 7, 1933, be the first inventor of a directional control blasting machine, or his patent be infringed on the basis that it is for a pioneer invention?

We submit that the Court of Appeals is in error in its statement that Pangborn by its complaint as amended is still seeking "to have the District Court of Delaware perform the functions of the Patent Office," if it ever sought this. As stated, Pangborn called the Court of Appeals' attention to the decision of the Commissioner of Patents of July 19, 1948 (R. 398) before the September 28, 1948, decision. No attempt was made to set aside the decree and judgment in "The Pittsburgh Suit." The action brought was against a "suitor" and not against the Court. It was the "suitor" which by fraud and deceit had induced the Court to make a tainted decree and tainted judgment. Relief was sought only from the suitor. This course was, we submit, sanctioned by Circuit Judge Goodrich in denying American's motion to dismiss (R. 94a-95a; citing *Steelman v. All-Continent Corp.*, 301 U. S. 278).

The Court of Appeals in the case *sub judice* says (R. 399) that "the Commissioner of Patents has now gone far toward granting the relief which Pangborn sought to obtain by its amended complaint." We would make a stronger statement—that the Commissioner of Patents by his decision of July 19, 1948 has gone as far toward granting the relief which Pangborn sought to obtain as his power and jurisdiction would permit.

The Court of Appeals suggests (R. 399) that Pangborn may by following an appropriate course "obtain the relief which it desires." This would be relief from American from the fraud it perpetrated in "The Pittsburgh Suit." It is, we submit, properly obtainable in the action *sub judice*. It might also be obtainable by "an independent action" brought pursuant to Rule 60(b)(3), R. C. P. But the latter apparently would substantially be a duplicate of the action *sub judice*, and there would seem to be no occasion why Pangborn should be put to further delay and expense which such "independent action" would cause.

We therefore submit the decision of the Court of Appeals should be reversed on points as follows:

- (1) To the extent that it dismissed Pangborn's pleadings;
- (2) Its affirmance of the District Court's order of May 27, 1947 denying *nunc pro tunc* as of May 15, 1947 Pangborn's motion to amend filed May 15, 1944; and
- (3) Its direction that the District Court strike Pangborn's answer filed January 6, 1948 (R. 370a-391a).

The proofs and representations made by American in the Patent Office, and particularly in Interference 72,090, antithetical to American's proofs and representations made in "The Pittsburgh Suit," are averred particularly in paragraphs 18 to 20, inclusive, of the amended complaint (R. 180a-189a).

They are also averred in Pangborn's answer filed August 23, 1943 (particularly R. 142a-143a; paragraph (f), R. 144a; and section 7, R. 150a).

They are also averred in Pangborn's answer filed January 6, 1948 (R. 370a-391a).

Respectfully submitted,

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APPENDIX*Machine of Peik Application S. N. 685,025.*

The salient features of this machine are disclosed in a transverse section of the rotor (E. B. 1x). The machine structurally and functionally is radically different from both the "Wheelabrator" and the "RA Rotoblast."

The machine comprises three essential parts as follows: (1) a gravity feed sand supply; (2) a rotor; and (3) an interposed, coaxial, transfer mechanism.

The *rotor* comprises side plates and four large sectors 13, filling the entire space between the plates, less four narrow, pipe-like passages 18, each having a rearwardly and outwardly curved portion and a radial portion with long, parallel walls. Each segment 13 has a long, arcuate, inner wall concentric with and in juxtaposition to the periphery of the shell 24 of the transfer mechanism.

The arcuate walls of the sectors 13, as they pass the single discharge opening 45, through the wall of shell 24, block the egress of abrasive therefrom. The blocked sand lodges in the narrow passages between the arcuate walls and the contiguous periphery of the shell 24 and by an attrition action rapidly destroys both. The sand passing through the radial portions of passages 18 ricochets from wall to wall of each passage and rapidly destroys the parallel walls.

The *gravity feed* comprises a sand supply and a vertical delivery pipe leading from the supply and discharging into one end of the shell 24 axially thereof.

The *transfer mechanism* comprises a cylindrical shell 24 normally stationary but adjustable about its axis. The shell has a single egress opening 45.

The transfer mechanism also includes a plurality of truncated, conoidal, "agitating lugs" 36, located in shell 24, which are carried by and rotate with the rotor.

This machine was never marketed.

Machine of Peik Patent No. 1,953,566.

This machine (E. B. 16x-20x) is radically different in construction from that of application S. N. 685,025. Instead of the large segments 13 of the latter, with long, arcuate,

inner ends, the machine of patent No. 1,953,566 comprises relatively narrow segments with knife-edge inner ends.

Between the contiguous walls of adjacent segments involute slots 26 are provided, terminating at their outer ends in short, flaring passages 28, having radial rear walls 29, faced with abrasive-resistant surfaces 30, such as tungsten carbide. As shown in Fig. 1 of the patent (E. B. 16x), the abrasive travels outwardly through the involute passages and discharges therefrom into collision with the rear wall of the associated flaring passage, as indicated by dotted line P. The force of the collision drives the abrasive in the direction of the arrow designated P¹ in Fig. 1 of the patent.

The abrasive flows from a suitable supply through a delivery spout 19 (E. B. 17x), which registers with a four-vane, solid-center impeller, which interferes the entrance of the abrasive and causes a part thereof to rebound toward the spout. The abrasive which enters the control sleeve 12 finds egress through outlet 23 into the inner ends of the passages 26 as they successively register with outlet 23.

This machine is not of the centrifugal type, but the walls 29 drive, or bat, the abrasive toward the article to be treated.

Tests of the machine developed two fatal infirmities: (1) the solid-center impeller so blocked the abrasive that but a trickle thereof could reach the involute passages 26; and (2) the abrasive which reached the batter walls 28 destroyed them in a period not to exceed twenty minutes.

The Practical Machines of the Parties.

American never made or marketed a Peik machine. Its "Wheelabrator" is the machine of the Hammell application S. N. 725,055, filed May 11, 1934. Practically a replica of the RA Rotoblast.

These machines have three main parts, substantially as follows:

(1) A rotor comprising a plurality of widely spaced apart, independent, thin, radial blades (E. B. 35x, 36x), each having a smooth, uninterrupted, propelling face of sufficient length to accelerate the abrasive smoothly and contin-

uously and without abrupt change in direction from the inner edge of the blade to its outer edge. In a standard size machine, about nineteen inches in diameter, the rotor is driven at a speed of approximately 2250 r.p.m., and will propel upwardly of 30,000 pounds of abrasive per hour.

(2) An abrasive supply including a discharge spout practically as designated 19 (E. B. 17x) and 21 (E. B. 27x).

(3) A transfer mechanism comprising a shell, or control ring (E. B. 35x, 36x), having a single peripheral egress opening, and a multi-vane impeller in the shell having an axial opening (E. B. 35x, 36x). The shell is designated 26, the egress opening 27, and the vanes 15, in Fig. 3 of patent No. 2,352,588 (E. B. 28x).

This patent discloses the "RA Rotoblast," in which the rotor comprises a disc 1, carried by a driving shaft 3. Projecting perpendicularly from one face of the disc, into free space, are four widely spaced apart, thin discs 10 (E. B. 27x, 28x).

In the operation of the "RA Rotoblast," as well as the "Wheelabrator," the abrasive discharging from the supply spout passes unobstructedly into and through the axial passage of the impeller and is propelled by the vanes of the latter through the egress opening of the shell, from which it travels in a stream outwardly in the free space into which the rotor blades project. The stream is not materially impeded by the blades because they are thin and widely separated from one another. In the rapid rotation of the rotor the inner marginal edges of their blades successively nip off and pick up the top of the abrasive stream. The slug so severed is by centrifugal force caused to travel outward lengthwise of the blade to glide from its outer edge at a velocity and in a direction which is the resultant of the momentum which it acquires in its travel with the blade (tangential force) and its momentum acquired in its movement lengthwise of the blade (centrifugal force).